

A **PRAKASA RAO SAMACHULU v. GREAT EASTERN LIFE
ASSURANCE (MALAYSIA) BHD**

HIGH COURT MALAYA, KUALA LUMPUR
WONG CHEE LIN J

[CIVIL APPEAL NO: WA-12BNCC-27-08-2017]

B 3 MAY 2018

C **INSURANCE:** *Accident insurance – Permanent disability – Construction of policy – Total and permanent disability – Whether should be understood in context of actual business or occupation – Pacific & Orient Insurance Co Sdn Bhd v. R Kathirvelu – Consideration of – Applicability*

D The plaintiff, a motor mechanic by profession, had taken a number of personal injury policies with the defendant. By the said policies, the defendant undertook to compensate the plaintiff if the latter were to suffer, in the course of performing his work as a mechanic, from injuries which led to a total and permanent disability ('TPD') on his part. TPD was quite similarly defined in the policies and *inter alia*, spoke of a state of incapacity which rendered the plaintiff permanently disabled or unable to do at least three of the eight activities of daily living listed. The plaintiff suffered from work-related injuries during the tenure of the policies ('the accident') which allegedly disabled him from working as a mechanic or in any other kind of work and, in the event, lodged claims for compensation under the policies amounting to RM746,700. The facts showed that the five doctors who examined the plaintiff, while testifying to the plaintiff's multiple inabilities, such as suffering from memory loss or muscle wasting in upper and lower limbs, did not conclusively state that the plaintiff suffered from TPD within the meaning of the term as defined in the policies. The defendant contested the claims, arguing that the plaintiff had not proved TPD, and in any case that the plaintiff had not at all suffered from TPD, as he was seen driving a motor car after the accident. To further prove the point, the defendant called in a traffic police officer ('SD1') who testified that traffic summons had been issued on the plaintiff after the accident. SD1, however, did not tender in court the summons in question, or a duplicate copy of it to prove that the plaintiff was actually the driver of the motor car in question. The Sessions Court found that there was no evidence to the effect that the plaintiff could not do works which did not involve manual labour and so dismissed the plaintiff's claim. The plaintiff appealed and the primary issue that arose was whether, on the facts and in the circumstances, the plaintiff had suffered TPD in accordance with the provisions of the policies purchased by him and was hence entitled to the compensation sought for.

I **Held (allowing appeal; ordering in terms):**

- (1) The Sessions Court Judge erred in dismissing the plaintiff's claim and in failing to consider the decision of the Supreme Court in *Pacific Orient Insurance Co Sdn Bhd v. R Kathirvelu*, which ruled that a clause defining

‘permanent total disablement’ should be understood in the context of the actual business or occupation of the plaintiff. The occupation of the plaintiff was that of a mechanic. The Sessions Court Judge found that the plaintiff could not return to his work as a mechanic, and hence, ought to have held that the plaintiff had suffered TPD. (paras 38, 39 & 42)

(2) Notwithstanding the evidence that the plaintiff was not precluded from carrying out work which was supervisory or administrative in nature, there was also no evidence led by the defendant as to exactly what, if any, job the plaintiff could carry on. To say merely that the plaintiff could give orders to his workers in the workshop from a wheelchair and was therefore not suffering from TPD was not logical. A person could not be said to attend to business simply because he was capable of doing, perhaps rather badly, some minor part of the work involved in that business. (para 41)

(3) The defendant, through SD1, only produced the traffic compound system summary and did not produce the duplicate copy of the purported summons/summonses. By not producing the summonses allegedly issued to the plaintiff, the defendant had not discharged the burden of proving that the plaintiff was driving a motor vehicle after his injury. (paras 31 & 34)

Case(s) referred to:

Gurdeep Singh Melkha Singh v. Malaysian Airlines System Berhad [2014] 1 LNS 784 HC (*refd*)

KPM Khidmat Sendirian Berhad v. Tey Kim Suie [1994] 3 CLJ 1 SC (*refd*)

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA (*refd*)

Pacific & Orient Insurance Co Sdn Bhd v. R Kathirvelu [1992] 1 CLJ 348; [1992] 1 CLJ (Rep) 251 SC (*foli*)

Pocock v. Century Insurance Company Ltd [1960] 2 Lloyd’s Report 150 (*refd*)

Legislation referred to:

Employees’ Social Security Act 1969, s. 49(2)

For the plaintiff - *M Ravindran; M/s M Ravendran & Assocs*

For the respondent - *Andrew Teh & Sara Anthony; M/s Wong Lu Peen & Tunku Alina*

Reported by Wan Sharif Ahmad

JUDGMENT

Wong Chee Lin J:

[1] This is an appeal against the decision of the Sessions Court Judge in dismissing the claim of the plaintiff (“appellant”) against his insured the defendant (“respondent”) in respect of claims under numerous policies taken up by the plaintiff with the defendant.

- A [2] I allowed the appeal of the plaintiff on 17 April 2018. These are the full reasons for my decision.

Salient Background Facts

- B [3] The plaintiff worked as a mechanic in a motorcar workshop which is owned by him. He suffered an injury to his neck as a result of an accident whilst working as a mechanic. He has taken out numerous personal injury policies issued by the defendant and had submitted a claim for compensation under the said policies based on him suffering total and permanent disability (“TPD”) as a result of the injury to his neck. His claim is for the sum of RM746,700.

- C [4] The policy definition for TPD under most of the policies the plaintiff purchased is similar if not identical and can be summarised as a state of incapacity which:

- D (i) is total and permanent and such that there is neither then nor at any time thereafter any work, occupation or profession that the life assured can ever sufficiently do or follow to earn or obtain any wages, compensation or profit; or
- E (ii) is deemed to be caused by total and irrecoverable loss of both eye sight, loss of use of two limbs at or above the wrist or ankle or total and irrecoverable loss of sight of one eye and loss of use of one limb at or above the wrist or ankle.

- F [5] Policy no. 9456261-5 and Policy no. 1000058454-6 provide a further alternative definition wherein TPD is also a state of incapacity which renders the insured disabled to such an extent as to be totally and permanently unable to perform at least three of the listed activities of daily living even with the use of mechanical equipment, special devices or other aids and adaption used by disabled person. For this purpose, the word “permanent” shall mean beyond the hope of recovery with current medical knowledge and technology. The resultant permanent function must be verified by a medical practitioner and duly concurred by the defendant’s medical officer.

- G [6] “Activities of Daily Living” means:
- H (i) getting in and out of chair without physical assistance;
- H (ii) the ability to move from room to room without physical assistance;
- (iii) the ability to voluntarily control bowel and bladder functions and to maintain personal hygiene;
- (iv) dressing and undressing;
- I (v) bathing and washing one’s self; and
- (vi) eating.

[7] The plaintiff was examined by the doctor nominated by the defendant, Dr Anbanandan (SP6) who certified that the plaintiff has permanent disability secondary to neurological deficit. A

[8] Five doctors gave evidence for this trial on the plaintiff's purported disability and medical condition. These doctors are:

(i) Dato' Dr Ramanathan @ Manickam a/l Ramiah (SP2); B

(ii) Dr Raveendran a/l S. Kandiah (SP5);

(iii) Dr Anbanandan a/l S. Subramaniam (SP6);

(iv) Professor Vickneswaran a/l Mathaneswaran (SP7); and C

(v) Dr Harwant Singh a/l Harcharan Singh Tara (SD5)

[9] Each doctor had made different findings and conclusions on the plaintiff's condition and whether he is totally and permanently disabled.

[10] A summary of the evidence given by each doctor is set out below: D

(i) Dato' Dr Ramanathan (SP2):

(a) Dr Rama is the first doctor who gave evidence. Dr Rama testified that the plaintiff appeared before SOCSO's Medical Board for disability pension benefits sometime in 2015. The plaintiff's request was denied at first instance but allowed subsequently by the appeal board. Dr Rama had sat in the appeal board which decided to allow the plaintiff disability pension benefit. E

(ii) Dr Rama confirmed during cross examination that there was no reason assigned to the appeal board's decision to reverse the primary finding. In reading the letter dated 10 June 2015, Dr Rama said that the appeal board allowed the plaintiff disability pension on the basis that the plaintiff will not be able to work in the capacity of the occupation he mentioned. Dr Rama subsequently said he is aware that the plaintiff works as a mechanic. F
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(ii) In summary, Dr Rama in his testimony confirmed as follows:

(a) the plaintiff appears to have weakness in his upper limb;

(b) it is possible that the plaintiff experienced pain in his upper limbs which cannot be explained; H

(c) there is wasting in the plaintiff's upper limb muscles. The cause for muscle wasting is because the plaintiff is not using the upper limbs. The cause could be that the nerve is injured or because of chronic pain; I

(d) Dr Rama assumed the wasting of the upper limb is caused by chronic regional pain. However this conclusion is not definitive because if someone chooses not to use the upper limb, the muscle is wasted anyway;

- A (e) it is possible for pain to be managed and once pain is managed, mobility of the upper limb can be increased;
- (f) there is no reason for the fusion in C5 to C6 to have any effect on the lower limbs. It is just the disc that was replaced, and the spinal cord was not affected. The plaintiff should not have any problem or
- B difficulty with his lower limbs;
- (g) there is no muscle wasting in the plaintiff's lower limbs;
- (h) the plaintiff was able to walk unaided when he presented himself to the appeal board on 27 May 2015.
- C [11] Dr Ravee was the orthopaedic surgeon who attended to the plaintiff in 2010. In his medical report dated 12 May 2011, Dr Ravee recorded that the plaintiff first consulted him in 2010 and he had complained of pain in the neck and right arms as a result of an alleged fall. On examination, Dr Ravee found that there was tenderness and stiffness in the cervical spine
- D but no neurological deficit.
- [12] Dr Ravee testified that he conducted an x-ray and MRI prior to surgery and the findings show that the plaintiff had a slip disc at C5/C6 level pressing on the right C6 nerve root. There was osteophyte and disc degeneration.
- E [13] According to Dr Ravee, corrective surgery was done and the surgery was a success. X-ray and MRI conducted post-surgery shows that the C5/C6 disc is healing well. In addition, Dr Ravee said that the C5/C6 procedures should not affect the plaintiff's lower limb.
- F [14] Dr Ravee had on 13 February 2011 filled in a form (at the plaintiff's request) in which the only disability recorded is weakness in left upper limb and concluded that the plaintiff had TPD with disability commencing 14 April 2010. However, Dr Ravee had confirmed in evidence that the plaintiff is still able to do supervisory work which does not involve manual
- G labour.
- [15] The plaintiff was referred to Dr Anbanandan ("Dr Anba") by the defendant in 2011 and Dr Anba was requested to fill in a medical questionnaire as follows:
- H (i) the plaintiff had apparently poor comprehension and memory loss;
- (ii) the plaintiff was unable to stand and had muscle wasting in both upper and lower limbs; and
- (iii) the plaintiff has permanent disability secondary to neurological deficit.
- I [16] In his testimony in court, Dr Anba explained that neurological deficit meant weakness in both the upper and lower limbs. He also testified that the plaintiff saw him while on a wheelchair and was wearing a cervical collar.

[17] Dr Anba's conclusion and observation contradicted Dr Ravee's medical report and the MRI report which states that there is no neurological deficit. A

[18] Professor Dr Vickneswaran ("Dr Viknes") (SP7):

- (i) the plaintiff had consulted Dr Viknes on 27 February 2015. Dr Viknes' report was the most recent and as such, should be the most accurate in terms of the plaintiff's alleged condition at the time his TPD claim was submitted; B
- (ii) Dr Viknes never concluded that the plaintiff suffered from total and permanent disability in his report but instead had recorded that the plaintiff would benefit from nerve conduction studies and that the plaintiff should be referred to a pain specialist; C
- (iii) when the plaintiff consulted Dr Viknes, he claimed that he was changing a gear box when it fell and in the process, he hit his neck at a bar nearby; D
- (iv) in his report, Dr Viknes had also recorded his observation of the plaintiff being sad and depressed;
- (e) Dr Viknes testified that the MRI and the clinical findings by Dr Ravee were not in sync and so he wondered about the need for the plaintiff to have surgery in the first place and felt there was a need to examine further; E
- (v) Dr Viknes confirmed that the plaintiff was right handed and during his clinical examinations, he found that the plaintiff had wasting in his right arm upper arm bicep muscles and deltoid. Apart from this, the rest of the hand was actually working fine; F
- (vi) Dr Viknes was of the opinion that the injury at the C5/C6 nerve has caused pain to the plaintiff and hence the restriction and wasting in the right arm biceps and deltoid only; G
- (vii) as for the rest of the pain complained of by the plaintiff, and also the other limb weakness, Dr Viknes was unsure of the cause of such and thus suggested a nerve conduction test. This is because the functions in the rest of the limbs seem almost normal but it was the plaintiff who seems to be holding a back a little; H
- (vii) Dr Viknes had testified that after many years of examining a patient, a doctor can sometimes tell if pain is actually restricting the movement. When Dr Viknes examined the plaintiff, he said that if the plaintiff did not have the pain, his power will be graded as "5". For neurological examination, the grade will be between 0-5. There is no plus (+). A plus (+) sign is usually indicated to tell others it is almost I

A normal but a little bit less. So for the plaintiff, save for his right upper limb which was graded 4/5 by Dr Viknes, the rest were graded 4+/5 which indicates it is almost normal;

(ix) Dr Viknes did not observe any wasting of muscle of the plaintiff's left upper limb nor the lower limbs. The plaintiff's reflexes were normal and the tone of his muscles also appeared to be normal. If there was a spinal cord injury, the injured limb will be stiff. If there was a nerve root injury, it will be very flexible like a *sotong*, it will just hang low. But the plaintiff was not like that. His muscle tone felt normal, neither stiff nor flaccid. The wasting of the muscles was limited to the proximal part of his right arm only ie, the biceps and a bit of the deltoid which is consistent with neck pain only;

(x) despite the muscle tone being normal, Dr Viknes noted that the plaintiff had difficulties getting up from chair and needed assistance. But at the same time, Dr Viknes also noted that the plaintiff was able to walk with coaxing;

(xi) Dr Viknes concluded that the weakness in the upper limb and lower limbs was secondary to pain and recommended for the plaintiff to see a pain doctor for the pain to be managed. Once the pain is managed, he said that the plaintiff may have better functional outcome;

(xii) Dr Viknes also confirmed that the plaintiff cannot do physical jobs because he can't use his dominant arm (right arm). But he is able to sit in the office and do work which is not physical in nature for example supervisory, administrative work, standing around and just telling people what to do;

(xiii) in fairness to Dr Viknes, he qualified his testimony that his decision to conclude that the plaintiff was unable to return to work was also limited and restricted to the fact that the plaintiff claimed he was a motor mechanic and not a workshop owner/proprietor.

G Submissions Of The Plaintiff In The Sessions Court

[19] The plaintiff submitted that he suffered from TPD as a result of his injury. He claims that he is unable to work either as a mechanic or in any other kind of work whatsoever including work of a supervisory nature.

H Submissions Of The Defendant In The Sessions Court

[20] The defendant submitted that pursuant to the wording of the policies, the plaintiff has not proved TPD. In particular, the defendant submitted that according to some of the medical evidence, the plaintiff was able to do work other than as a mechanic and he can do work which is not of a physical or manual nature.

[21] The defendant also submitted that there was evidence that the plaintiff was driving a motor car after his accident and was observed by two nurses at Columbia Asia Hospital at Bukit Rimau (when he was admitted for acute myocardial infarction) sometime in July 2016 as being able to walk without any aid, able to stand, did not require assistance for bathing or dressing, was able to eat on his own, no physical impairment seen, no abnormal movements or abnormal gait observed, had normal cognitive abilities and was able to respond to the questions posed and able to communicate with them.

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Findings Of The Sessions Court

[22] The Sessions Court Judge found on all the evidence before him that the evidence only showed that the plaintiff could not return to his work as a mechanic as a result of the injuries suffered by him. However, that could not avail him in respect of his claim under the policies.

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[23] The Sessions Court Judge held that there was no evidence to the effect that the plaintiff could not do other work which does not involve manual labour such as work of a supervisory or administrative nature.

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[24] Consequently, the Sessions Court Judge held that the plaintiff could not recover under the policies purchased by him.

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The Law On Appellate Intervention

[25] The law insofar as appellate intervention is concerned is set out in the Court of Appeal case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 where the Court of Appeal held as follows:

Very recently, this Court in *Arab Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585 CA, reviewed some of the leading authorities on appellate intervention and identified the general rule of appellate non-interference. We also considered some of the categories in which appellate interference is warranted. We find it unnecessary to repeat what we there said. Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.

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A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also

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- A test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of the witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.
- B There are a number of important and leading cases in which the point has been considered.

- C In all the circumstances, having regard to the fact that the trial judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences from, the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he had not taken proper advantage of his having seen and heard witnesses (per Lord Thankerton in *Watt or Thomas v. Thomas* [1947] 1 All ER 582) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence.

D **My Decision**

- E [26] The only issue in this case is whether the plaintiff has suffered a TPD in accordance with the provisions of the policies purchased by him. He was working as a mechanic prior to his accident and the evidence suggests that he could not work as a mechanic after the accident but that he could do work of a supervisory or administrative nature. I also note that it is not the evidence of the plaintiff that he was unable to perform at least three of the listed activities of daily living as stipulated in policy no. 9456261-5 and policy no. 1000058454-6.

- F [27] The defendant alleged that the plaintiff was able to drive a motor vehicle based on a traffic compound system summary which showed that the police from the traffic division had issued traffic summonses for traffic offences purportedly committed by the plaintiff. The defendant had produced Assistant Superintendent of Police Encik Muhaidi bin Yacob (SD1).

- G [28] SD1 had testified that there are two types of summonses issued by the police, one is under form 257 and the other is form 170A. SD1 went to explain form 170A is actual a notice informing the motor car owner that his vehicle was involved in a traffic offence whereas form 257 is a summons that is issued to the driver of the motor car.

- H [29] SD1 was produced to tender exh. D14, the traffic compound system summary wherein the defendant contends that two summonses were summonses in the form of summons form 257 and hence the plaintiff was the person that drove the motor car thus rebutting the finding of Dr Raveendran S Kandiah (SP5) that the plaintiff cannot drive a motor car.

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[30] During cross-examination of SD1 with regards to exh. D14, it was asked as follows: A

S: Tuan, jikalau Tuan tahu, kalau Tuan tak tahu boleh cakap tak tahu, setakat kes-kes trafik berkenaan missal kata kesalahan nombor 4 atau 6 whichever kesalahan 1 hingga enam isi adakah dokumen 58 ini memadai untuk membuktikan satu kesalahan yang dilakukan oleh pemegang kad tersebut? B

J: Kita tidak boleh membuktikan benda itu, sebab kita ada kertas saman yang dikeluarkan akan ada dekat daerah masing-masing.

S: So maksud erti kata lain, terdapat salinan pendua saman tersebut? Tuan setuju dengan pernyataan tersebut? C

J: Ya, betul ada.

S: Kalau ingin teruskan dengan kes mahkamah, kes trafik, ada terdapatnya salinan pendua saman tersebut?

J: Ya betul. D

S: Baik Tuan, setuju berdasarkan kepada dokumen ini setuju dokumen ini bukan saman tersebut?

J: Bukan.

S: Sorry, maafkan saya. Let me get it more specific. Berdasarkan kepada kesalahan 4 dan kesalahan 6, saya katakan dokumen ini bukan salinan pendua saman tersebut. E

J: Setuju.

S: To be more specific saya merujuk kepada saman nombor 4 dan saman nombor 6 tiada sebarang tindakan mahkamah diambil setakat ini? Tuan again kalau Tuan tahu, tahu. Tidak tahu, tidak tahu setuju tidak setuju. Cuma dapatkan verifikasi? F

J: Setuju.

S: Tidak? Tiada tindakan mahkamah diambil?

J: Ya. G

S: Memandangkan tiada tindakan mahkamah yang diambil terhadap OKS tersebut, setujukah bahawa ia bermaksud bahawa fakta OKS telah melakukan satu kesalahan belum lagi dibuktikan?

J: Betul, belum lagi dibuktikan. H

S: So fakta bahawa pemilik kad pengenalan ini adalah pemandu untuk kes saman nombor 4 dan nombor 6 belum lagi dibuktikan di mahkamah?

J: Belum lagi dibuktikan. I

[31] It is noted that the defendant only produced the traffic compound system summary and did not produce the duplicate copy of the purported summonses to prove that the plaintiff was actually the driver of the motor car.

A [32] The plaintiff prior to the accident was working as a mechanic wherein he repairs all sorts of motor vehicles. The plaintiff ran his own business, called Service Kereta S.P Prakasa Rao.

[33] In the Supreme Court case of *KPM Khidmat Sendirian Berhad v. Tey Kim Suie* [1994] 3 CLJ 1, it was held:

B Moreover, the record book of the respondent, which was the source document upon which the summary of accounts were prepared, was never produced. It is a well-established rule of evidence that when documentary evidence is tendered, primary evidence of the said document must be adduced except in the cases under s. 65 of the Evidence Act. According to *Sarkar on Evidence*, 14th Edn. 1993 p. 961, when a given matter has been expressed in writing, the primary evidence of it is the writing itself and subject to the provisions of s. 65, the writing, unless admitted by the other side must be produced if it is desired to prove the matter expressed in it. On the question of a balance sheet, the Indian Supreme Court, in *Petlad Turkey Red Dye Works Ltd v. Dyes & Chemical Workers' Union, Petlad & Anor* [1960] 2 SCR 906, has held that a balance sheet does not by itself prove the facts stated therein. It has to be proved like any other fact by affidavit or otherwise. Das Gupta J., delivering the judgment of the Court, stated (at p. 909):

E All that the balance-sheet, as submitted, shows is that certain statements were made. The mere fact that the statements were made can never be taken as proving that the statements were correct.

F That is a distinction which the Courts of law have always been careful to make. Thus, if a person is to prove that he was ill on a particular date, the mere filing of a certificate of a medical man that he was ill on that date is not accepted as evidence to show that he was ill. The correctness of the statement made in the certificate has to be proved by an affidavit or oral testimony in Court by the Doctor concerned or by some other evidence. There is no reason why an exception should be made in the case of balance sheets prepared by Companies for themselves. It has to be borne in mind that in many cases the Directors of the Companies may feel inclined to make incorrect statements in these balance-sheets for ulterior purposes. While that is no reason to suspect every statement made in these balance sheets, the position is clear that we cannot presume the statements made therein to be always correct. The burden is on the party who asserts a statement to be correct to prove the same by relevant and acceptable evidence.

G Likewise, in the instant case, the summary of accounts does not prove the facts and particulars stated therein. The mere fact that the summary of the particulars were made could never be taken as proving that the contents were correct.

I In order for the Court to rely on the summary of accounts (pp. 117-121 Appeal Record), the respondent must satisfy the Court that his record book was lost to enable secondary evidence relating to the said book to be given...

On the principle and scope of s. 65, we respectfully rely on the commentary in Sarkar on Evidence (at p. 964):

It has been seen that the contents of a document must be proved by the production of the original document and secondary evidence of it is not generally admissible (s. 64). There are exceptions to the rule and this section states the various class of cases in which secondary evidence relating to documents may be given. The principle is that so long as the original exists and is available, it being the best evidence must be produce. If it cannot be had on account of its loss, destruction, detention by the opponent, or third person who does not produce after notice, physical or legal irremovability, or any other cause, secondary evidence is admissible.

Looking at the matter as a whole, we have come to the conclusion that the learned Judicial Commissioner was wrong in relying on the summary of accounts (pp. 117-121 Appeal Record) as sufficient proof of the debt due to the respondent bearing in mind that the burden of proof always lies on the respondent to prove his claim. We hasten to add that since the summary of accounts is inadmissible for reasons which we have adverted to above, it is our further conclusion that as there is no documentary evidence before the Court which the respondent can rely on to substantiate his claim, his case against the appellant must accordingly fail.

[34] By not producing the summonses that were allegedly issued to the plaintiff, I am of the view that the defendant has not discharged the burden of proving that the plaintiff was driving a motor vehicle after his injury.

[35] The plaintiff, on appeal, was granted a pension by Pertubuhan Keselamatan Sosial (SOCSO). The plaintiff said that the issue whether he was able to work as a supervisor or administrator is irrelevant because of s. 49(2) of the Employees' Social Security Act 1969:

(2) The Organization may suspend the pension if and so long as the invalid pensioner:

(a) engages in any employment by virtue of which he is liable to be insured under this Act, if the amount earned from such employment is more than one third of his average were before invalidity;

[36] The defendant objected on the basis that this issue was never pleaded by the plaintiff nor brought up in the proceedings in the Sessions Court. I agree that it is too late in the day for the plaintiff to rely on this point. In any event, s. 49(2) does not advance the case of the plaintiff because it does not show that the invalid pensioner cannot engage in employment after getting his pension. It only provides for his pension to be suspended in certain circumstances.

A [37] As for the nurses' evidence, this shows that the plaintiff may not fall within the definition of TPD in Policy No. 9456261-5 and Policy No. 1000058454-6 but does not show that the plaintiff was able to continue his work as a mechanic.

B [38] However, I am of the view that the Sessions Court Judge had erred in one respect. He did not consider the decision of the Supreme Court in *Pacific & Orient Insurance Co Sdn Bhd v. R Kathirvelu* [1992] 1 CLJ 348; [1992] 1 CLJ (Rep) 251 where it was held as follows:

C As for the plaintiff's incapacity due to the injury, we would prefer to follow *Pocock's* case (*supra*) and looking at the whole policy hold that the definitions section therein, in particular that clause defining permanent total disablement as "absolute disablement from engaging in or giving attention to profession or occupation of any kind", should be understood in the context of the actual business or occupation of the plaintiff. Moreover it is quite clear from the evidence in this case that the plaintiff would never again be able to resume his occupation as a technical assistant in the Jabatan Kerja Raya and was therefore permanently and totally disable (sic) within the meaning of the policy.

D Having considered the evidence and the submissions of Counsel on the first issue, we would agree with the learned Judge's finding that the bodily injury suffered by the plaintiff was solely and independently caused by the two accidents in the sense that they were the proximate cause of his permanent total disablement in this case and had prevented him from continuing this occupation as a technical assistant in the Jabatan Kerja Raya.

E [39] The abovesaid decision is binding on this court. The actual occupation of the plaintiff is that of a mechanic. The Sessions Court Judge found that to be the case. His Honour also found it to be the case that the evidence shows that the plaintiff could not return to his work as a mechanic. Based on the said case of *Pacific & Orient Insurance*, the Sessions Court Judge ought to be held that the plaintiff had suffered a TPD.

F [40] In the High Court case of *Gurdeep Singh Melkha Singh v Malaysian Airlines System Berhad* [2014] 1 LNS 784, it was held as follows:

G However, I am of the opinion that the permanent disablement suffered by the plaintiff in this case should be viewed in a different context. Plaintiff used to be a pilot, so he needs his flying licence to fly again. Does the current state of the plaintiff or in the future warrants him to fly again? Based on the medical report and the evidence adduced before me, it is my considered view that he can't. Therefore his situation suit the ordinary meaning of 'permanent' 'disablement' as defined above. Since the plaintiff's employment govern by the MOU, the words 'permanent disablement' in clause 3 of the MOUT should be interpreted in relation to the plaintiff's employment ie, plaintiff will be permanently disable to fly again.

[41] Notwithstanding the medical evidence that the plaintiff is not precluded from carrying out work which is supervisory or administrative in nature, there is also no evidence led by the defendant as to exactly what, if any, job the plaintiff could actually carry on. To say merely that the plaintiff could give orders to his workers in the workshop from a wheelchair and is therefore not suffering from TPD is not logical. A person could not be said to attend to business simply because he was capable of doing, perhaps rather badly, some minor part of the work involved in that business. (see *Pocock v. Century Insurance Company Ltd* [1960] 2 Lloyd's Report 150).

[42] Due to the aforesaid reasons, I am of the view that the Sessions Court Judge had erred in dismissing the claim of the plaintiff. In the circumstances, I allow the appeal and grant judgment in favour of the plaintiff as prayed in his claim with costs of RM5,000 subject to allocator. The parties have confirmed that if liability is in favour of the plaintiff, the quantum of his claim is not in dispute.

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